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249-602—67

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1060

OSCAR GRUSS & SON, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the judgment of a three-judge district court (J.S. A–15) dismissing appellant's suit to set aside orders of the Interstate Commerce Commission approving the merger of the Pennsylvania Railroad Company and the New York Central Railroad Company (327 I.C.C. 475; 328 I.C.C. 304). The Commission, as a condition of approving the merger (see Interstate Commerce Act, § 5(2)(b), 49 U.S.C. 5(2)(b)), had ordered the inclusion in the merged company of the bankrupt New York, New

Haven and Hartford Railroad Company, under terms and conditions to be determined by the Commission and the bankruptcy court after the merger's consummation (327 I.C.C. at 522–527; 328 I.C.C. at 306, 318–320). Appellant, the holder of approximately 14 percent of the New Haven's first-mortgage bonds, challenged the Commission's orders on the ground that the Commission should have delayed consummation of the Penn-Central merger until the New Haven's inclusion in the Penn-Central system was wholly effected. Appellant argued that the New Haven's remaining assets would be dissipated if the road was forced to compete against Penn-Central.

The background of this dispute may be stated briefly. In July 1961, the New Haven filed a petition in the United States District Court for the District of Connecticut for reorganization under Section 77 of the Bankruptcy Act, 11 U.S.C. 205. In June 1962, shortly after Penn and Central had asked the Commission for permission to merge, the trustees appointed by the bankruptcy court (Judge Anderson) to act for the bankrupt New Haven asked the Commission to condition approval of the merger on inclusion of the New Haven in the merged system. They later took the position before the Commission that inclusion of the New Haven should be a condition precedent to consummation of the merger. However, after the Commission's hearing examiners, in their March 1965 report, recommended against such a condition, the trustees receded. In a memorandum of understanding with Penn and Central, filed in the bankruptcy court in April 1965 and with the Commission two months later, they agreed to the sale of the

New Haven's assets to the merged system upon terms and conditions to be determined after the merger was consummated.[1]

At this stage appellant was largely at one with the trustees. In July 1965 it had advised the Commission that the examiners' recommendations with respect to inclusion of the New Haven were "entirely fair and reasonable," that it had no objection to them and that it did not seek the status of an intervenor in the Commission proceeding—albeit it did offer (in its own words) "one minor suggestion": that the Commission require the merged company to assume responsibility for the New Haven's freight operations upon the effective date of the merger. One month earlier, in seeking intervention in the bankruptcy proceeding, appellant had alleged that the memorandum of understanding contemplated an inadequate consideration, but not that consummation of the Penn-Central merger should be postponed until the actual inclusion of the New Haven. Judge Anderson had denied intervention, ruling that appellant's interests were adequately represented by the trustees and by the bondholders' committee and that appellant had failed to show how its presence as a party would assist in the bankruptcy proceeding, and noting that appellant had purchased its bonds subsequent to the initiation of the bankruptcy proceeding and for purposes of speculation.[2] (Trustees' Motion to Affirm,

[1] The memorandum of understanding was later reduced to a detailed agreement as to price, terms and conditions.

[2] At the same time Judge Anderson ruled that appellant had a right to be heard on all questions in the proceedings and would be notified of all developments.

pp. A-8–10.) No appeal was taken from his decision.

In July 1966—after the Commission's decision of April 27, 1966, approving the Penn-Central merger on condition that the merged system include the New Haven on terms to be negotiated later—appellant, for the first time, argued to the Commission that inclusion of the New Haven should be required before consummation of the merger was allowed. In its report on reconsideration the Commission, on September 16, 1966, rejected this argument on the ground that the course proposed would entail undue delay (328 I.C.C. at 306). The same month the trustees submitted to the bankruptcy court a plan of reorganization contemplating the inclusion of the New Haven in the merged Penn-Central, which they asked leave to submit to the Commission for approval. In October, Judge Anderson, finding the plan *prima facie* suitable, authorized the trustees to expend the necessary funds in presenting it to the Commission but made clear that he would not pass on the merits of the plan—particularly its provisions for compensation of the bankrupt estate—until the Commission had approved a final plan setting forth the terms and conditions of inclusion.[3] Appellant has sought judicial review of this decision in the Court of Appeals for the Second Circuit, where the matter is now pending.[4]

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[3] The court's opinion is reprinted at pp. 10–19 of the Trustee's Statement and Plan of Reorganization submitted to the Commission, which has been lodged with this Court.

[4] Appellant's attack (J.S. 15–17) on the Trustees' two-step plan of inclusion is an issue in that appeal. Oral argument on the appeal is expected this spring.

In the proceeding below, the court held unanimously that appellant lacked standing to sue, and accordingly dismissed the suit. It further ruled—again unanimously—that the Commission had acted within the scope of its authority in declining to delay consummation of the Penn-Central merger as urged by appellant.

At the present time, hearings are in progress before a hearing examiner of the Commission to determine the terms and conditions of the New Haven's inclusion in Penn-Central and the suitability of the reorganization plan. Consummation of the Penn-Central merger remains stayed by order of this Court pending decision of the appeals of a number of Eastern railroads (and other parties) from the refusal of the same three-judge court to grant a preliminary injunction against the merger. *Baltimore & O. R.R.* v. *United States*, No. 642, this Term, etc.

ARGUMENT

1. The court below correctly ruled that appellant, as a creditor of the bankrupt New Haven, lacked standing to challenge the Commission's refusal to defer the Penn-Central merger until the details of the New Haven's inclusion in the merged system could be worked out.[5] Appellant itself appears to concede

[5] See *Pittsburgh & West Virginia Ry.* v. *United States*, 281 U.S. 479, 486–488; *American Power & Light Co.* v. *S.E.C.*, 325 U.S. 385, 388–389; *Schenley Distillers Corp.* v. *United States*, 326 U.S. 432, 435; *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 160. The argument that appellant automatically may maintain suit because it was allowed to intervene before the Commission is without merit. *Alexander Sprunt & Son, Inc.* v. *United States*, 281 U.S. 249, 255; *Pittsburgh & West Vir-*

(J.S. 24)—as it must—that the bankruptcy laws contemplate that a bankrupt company shall speak with one voice: that of the trustees, representing the interests of all of the creditors. See Bankruptcy Act, §§ 77(c)(2), 44. It would be chaos to permit each creditor or group or class of creditors to assert positions contrary to that of the trustees in litigation affecting the bankrupt estate (J.S. A–10–11).

So saying, we do not suggest that particular creditors are not entitled to make their views heard in the formulation of the trustees' position. Of course they are. But the proper place for such a hearing is in the bankruptcy proceeding. Only there can a single position be fashioned that will best represent the interests of the creditors as a whole. Appellant had an opportunity—of which it availed itself—to present its views to Judge Anderson in the bankruptcy proceeding. Although Judge Anderson ruled against appellant, appellant has pending in the Court of Appeals for the Second Circuit an appeal from his decision. If the appeal succeeds, the trustees' instructions may be changed. But if it fails, appellant, like the other creditors of the New Haven, will, we submit, be bound by the instructions that Judge Anderson has given. For it would be manifestly incompatible with orderly bankruptcy administration to allow collateral litigation in which the bankrupt estate was involved to be-

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ginia, *supra*, at 486. Accord: *Group of Boston & P.R.C. Stockholders* v. *Interstate Commerce Commission*, 133 F. Supp. 488, 492–493 (E.D. Va.), affirmed *per curiam*, 350 U.S. 926; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 130 F. Supp. 76, 78 (E.D. Mo.), affirmed *per curiam*, 350 U.S. 892; *Seatrain Lines* v. *United States*, 152 F. Supp. 619, 622 (D. Del.), affirmed *per curiam*, 355 U.S. 181.

come a vehicle for attempting to resolve disputes among the creditors.

2. Alternatively, we urge that appellant lacks standing to maintain this suit because it is not injured by the orders it is challenging. The extent to which the bankrupt estate will be able to satisfy appellant's claim against it depends on the price that Penn-Central pays for the New Haven's assets. That price has not yet been determined. The Commission will fix it (subject to review by the bankruptcy court, see Bankruptcy Act, § 77 (d), (e)) in the current proceeding on the terms and conditions of the New Haven's inclusion in the merged system. Unless and until that price is set at a level too low to pay appellant's claim in full, appellant has no possible cause to complain. To be sure, appellant expresses fear that if consummation of the merger is permitted before the actual inclusion of the New Haven, the competition of the merged system will cause a further deterioration in the value of the New Haven's assets. However, in fixing the price that Penn-Central must pay the New Haven for its assets, the Commission can, of course, as the court below expressly held (J.S. A–6–7), insist that the merged system restore any losses it may have inflicted on the New Haven. Only if the Commission fails to do so will appellant be aggrieved. At this stage the injury appellant complains of is purely hypothetical, and its challenge premature.

3. In stressing our view that appellant lacked standing to maintain this action, we do not mean to intimate disagreement with the view of the district court that, on the merits too, appellant's suit must fail.

The United States, to be sure, has joined with a number of the Eastern railroads in questioning the propriety of the Commission's refusal to postpone consummation of the Penn-Central merger pending the outcome of proceedings to determine whether three Eastern roads—the Erie-Lackawanna, the Delaware and Hudson, and the Boston and Maine—should be included in the Norfolk and Western system and to formulate conditions for the protection of those roads from competitive harm until inclusion is effected. That case is now awaiting decision by this Court. *Baltimore & O. R.R.* v. *United States,* No. 642, this Term, etc. The issues, however, are quite different from those here—as evidenced by the fact that Judge Weinfeld, who dissented in that case, joined the decision below.

The sole concern of the United States in the *Baltimore & O. R.R.* case was that, by permitting consummation before resolving the fate of the three affected roads and devising final interim protective conditions, the Commission was impairing its ability to fashion a solution that would assure the survival of the affected roads in an alignment consistent with the public interest. Concretely, the United States expressed fear that should it prove impracticable to devise effective interim protection, the survival of the affected roads might be jeopardized, and that should it prove impracticable to require the Norfolk and Western to absorb those roads in the weakened state to which the competition of Penn-Central might reduce them, the Commission might be drawn into approving a possibly unsound solution to the problem of the orphan roads—

such as their affiliation with the Penn-Central or a merger between Norfolk and Western and the C&O–B&O system.

No similar danger is presented by the Commission's refusal to postpone consummation of the Penn-Central merger until the terms of the New Haven's inclusion are determined. We take it to be common ground among all the principal parties that the public interest supports the inclusion of the New Haven in the Penn-Central system if such a system is created. Indeed, the home for the New Haven that the merger provides is an important reason advanced in support of the merger. On this phase of the Penn-Central controversy, then, the only issue involves the details of the inclusion—in particular, the price that Penn-Central will be required to pay for the New Haven's assets. That issue, we believe, can be resolved as readily after the consummation of the merger as before. There is no reason to believe either that Penn-Central will be unable to pay a fair and reasonable price for the assets or that the Commission's order directing inclusion will come unstuck because of haggling over the terms and conditions of the transaction. At least, the danger seems sufficiently remote that the Commission could deem it outweighed by the interest in prompt consummation. Nor was the Commission required to devise conditions for the interim protection of the New Haven. No one had requested that such conditions be imposed, perhaps because—the New Haven already being bankrupt—it was thought that the time when

such conditions might have served a useful purpose had passed.

CONCLUSION

The judgment of the district court should be affirmed.*

Respectfully submitted.

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MARCH 1967.

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* We recognize that the Court may wish to defer action on this appeal until it decides the pending appeals in the *Baltimore & O. R.R.* matter. Should the Court adopt the most extreme position there urged—that the Penn-Central merger should be permanently enjoined—this appeal would obviously be moot. Should the Court direct the entry of a preliminary injunction against the merger on the ground that the Commission is required to decide all related matters before permitting consummation of a major rail merger, and should it be disposed to reject our standing argument in this case, it might—depending of course on the reach of its opinion—appropriately remand the present case for further consideration of the merits of appellant's suit.

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